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IN THE

Supreme Court of the United States

October Term, 1989

CHARLES SCULLY, Superintendent of
Greenhaven Correctional Facility,
and STATE OF NEW YORK,

Petitioners,

- against -

FRANK C. PETERSON (80-A-1720),

Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the rule announced in Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572, 579 (1969) -- that where a state court does not indicate whether it has passed upon a federal question, there is a presumption "that the omission was due to want of proper presentation in the state courts, unless the aggrieved in this Court can affirmatively show the contrary" -- should apply to habeas corpus proceedings?

2. Whether "law and justice," 28 U.S.C. § 2243, mandate that a federal habeas court review the merits of a constitutional claim raised where no trial objection was made in state court and a federal appeals court would have been without authority, absent "plain error," to review the claim were the case a federal, not state prosecution?

3. Whether the interest in federal-state comity precludes the application of the new rule of construction announced in Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 103 L.E.2d 308 (1989), to cases in which the state appeals were decided prior to it?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO. 89 -

CHARLES SCULLY, Superintendent of Greenhaven Correctional Facility, and STATE OF NEW YORK,

Petitioners,

-against-

FRANK C. PETERSON (80-A-1720),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

The New York County District Attorney, on behalf of Charles Scully, Superintendent of the Greenhaven Correctional Facility, and the State of New York, petitions for a writ of certiorari to

review an order of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the New York Supreme Court, Appellate Division, First Department, affirming respondent's conviction (App. Exh. A, pp. 1-5)*, is reported as People v. Peterson, 116 A.D.2d 461, 497 N.Y.S.2d 867 (1986). The certificate denying respondent's application for leave to appeal to the New York Court of Appeals (App. Exh. B, pp. 6-7) is reported as People v. Peterson, 67 N.Y.2d 948, 502 N.Y.S.2d 1042, 494 N.E.2d 127 (1986).

The Magistrate's report and recommendation (App. Exh. C, pp. 8-49) is unreported. The memorandum opinion and order of the United States District Court for the Southern District of New York (App. Exh. D, pp. 50-60), Peterson v. Scully,

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*The Appendix to the petition is separately bound.

No. 87 Civ. 1597 (CSH)(S.D.N.Y. Jan. 11, 1989), is unreported. The order of the United States Court of Appeals for the Second Circuit vacating and remanding the action to the District Court (App. Exh. E, pp. 61-73) is reported as Peterson v. Scully, 896 F.2d 661 (2d Cir. 1990).

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit vacating and remanding the petition to the District Court for consideration on the merits was entered February 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. section 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. section 2243 provides, in pertinent part:

> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

STATEMENT OF THE CASE

In May, 1977, shortly after his release from prison on parole, Respondent Frank C. Peterson, hereinafter Peterson, began a series of sexual attacks and robberies upon women which followed a distinctive pattern. Peterson would follow the women into their locked buildings and force them to take him into their apartments. Once inside the apartments, he made his victims undress and perform fellatio upon him. He then raped them, placed them in a closet or bathroom, and ordered them to count aloud while he stole property from the apartments and fled.

On October 28, 1977, Peterson was arrested immediately following an attack upon a woman. In multiple indictments, he was charged with numerous

counts of rape, robbery, and sodomy, arising out of separate attacks upon six different women.[1]

Peterson was tried on New York County Indictment Number 5123/77, charging him with robbery and sexual crimes against two victims, Cheryl Dolinger and Dianne Culpen, before Justice Burton B. Roberts and a jury. On May 12, 1980, Peterson was found guilty of two counts each of Rape in the First Degree (New York Penal Law §130.35), Sodomy in the First Degree (New York Penal Law §130.50), and Robbery in the First

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[1]Peterson was tried first on New York County Indictment Number 4625/77, charging him with the rape and robbery of Gloria Affigne. After a jury trial in Supreme Court, New York County, before Justice Dennis Edwards, Peterson was found guilty as charged. Peterson brought a habeas corpus petition to challenge the consecutive sentences imposed as a result of the conviction on Indictment Number 4625/77 in the United States District Court for the Southern District of New York. The District Court permitted withdrawal of that petition on August 19, 1988. Peterson v. Scully, No. 88 Civ. 1018 (RJW)(S.D.N.Y. Aug. 19, 1988).

Degree (New York Penal Law §160.15).[2] Peterson was sentenced to indeterminate terms of imprisonment of from twelve and one-half to

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[2]Other counts in Indictment Number 5123/77 charged defendant with the rape and robbery of a third victim, Hephzibah Barrette. On the People's motion, the counts relating to Barrette were severed prior to trial. Following Peterson's conviction, the counts relating to Barrette and all the counts contained in a third indictment were dismissed on the People's motion. The basis of the motion was that certain "capping" provisions in New York's Penal Law provided that the effective length of Peterson's sentences would not be increased by additional convictions and therefore that no useful purpose would be served by prosecuting him for the untried counts.

twenty-five years. [3] It is his custody on this conviction which is at issue.

THE STATE APPEAL

Peterson appealed to the New York Supreme Court, Appellate Division, First Department. There he claimed, inter alia, that he had been deprived of a fair trial by the trial judge's biased intervention into the examination of the witnesses. In response, the People argued that the claim had not been preserved for review on

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[3]Justice Burton B. Roberts ordered that the sentences imposed for the three counts relating to each victim run concurrently, but consecutively to the terms imposed for the counts relating to the other victim. Justice Roberts also ordered Peterson's sentences to run concurrently with other sentences imposed on September 6, 1979, following Peterson's conviction on unrelated counts of rape, sodomy, and robbery. The sentences from that conviction aggregate to a total of twenty-five to fifty years imprisonment. In addition, the judge ordered Peterson's sentences to run consecutively to the approximately fifteen years Peterson still owed on sentences imposed for several 1971 convictions. Peterson is currently serving these sentences.

appeal by trial objection and, in any event, was without merit.

On January 2, 1986, the Appellate Division unanimously affirmed Peterson's conviction (App. Exh. A, pp. 1-5). In a memorandum opinion, three of the five justices stated that they were affirming the conviction "in view of the overwhelming proof of [Peterson's] guilt," but added,"[w]e must note, however, the inappropriateness of [the] Criminal Term's unwarranted and excessive intrusion into the conduct of the trial . . . . Had the proof of guilt not been established by such overwhelming evidence, as was here presented, the result of our review might well have been different" (App. Exh. A, p. 4). Justice Sidney Asch concurred in the result only (App. Exh. A, p. 4). Justice Theodore Kupferman, in a separate memorandum opinion, wrote, "I would merely affirm" (App. Exh. A, p.5).

Peterson then sought leave to appeal to the

New York Court of Appeals. That application was referred first to Associate Judge Fritz W. Alexander and then to Associate Judge Vito J. Titone. In his application, Peterson argued that his judicial interference claim should be reviewed. In opposition, the People argued that the judicial interference claim could not be reviewed because it had not been preserved for review on appeal. The People pointed out that New York law does not permit harmless error analysis as to a judicial interference claim. Noting that the Appellate Division's opinion, itself, contained no reference either to harmless error or any decision which rested on a finding of harmless error, the People argued that that court, having found the proof of Peterson's guilt truly overwhelming, declined to exercise its interest of justice jurisdiction to consider the unpreserved

judicial misconduct claim as an issue of law.[4] On April 29, 1986, Judge Titone issued a certificate denying leave to appeal to the Court of Appeals (App. Exh. B, pp. 6-7).

THE FEDERAL HABEAS CORPUS PROCEEDING

The District Court

In March 1987, Peterson filed a petition for a writ of habeas corpus. His single claim was that judicial interference by the trial judge violated his federal constitutional right to a fair trial. United States District Judge Charles S. Haight, Jr. referred the petition to United States Magistrate Joel J. Tyler. The magistrate issued a report and recommendation, concluding that the petition should be denied (App. Exh C, p.

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[4] In New York, the intermediate appellate court has special authority to review unpreserved claims in the "interest of justice" even in the absence of objection. New York Criminal Procedure Law §470.15(3)(c). The New York Court of Appeals does not possess that special power. New York Criminal Procedure Law §470.35.

8). Pointing to Peterson's failure to object at trial to the alleged instances of interference, the magistrate found that the federal constitutional claim of judicial interference was forfeited (App. Exh. C, pp. 26, 35, 46-47). The magistrate also concluded that the reasonable interpretation of the Appellate Division's decision required the conclusion that it had upheld the People's claim of a procedural bar (App. Exh. C, p. 35). On January 11, 1989, Judge Haight issued a memorandum opinion and order adopting the magistrate's report and recommendation in its "entirety," and denying and dismissing the petition (App. Exh. D, p. 60).

The Second Circuit

Peterson appealed to the United States Court of Appeals for the Second Circuit. In response to Peterson's effort to raise the merits of the judicial misconduct claim, the state argued that:

(1) since the state courts did not pass upon any federal question in determining Peterson's appeal, under Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572, 579 (1969), there is a presumption "that the omission was due to want of proper presentation in the state courts"; (2) "law and justice," 28 U.S.C. § 2243, mandate that a federal habeas court not review a constitutional claim raised where no trial objection was made in state court; and (3) the new rule of construction announced in Harris v. Reed, ____ U.S. ____, 109 S.Ct. 1038, 103 L.E.2d 308 (1989), should not be applied to cases in which the state appeals were decided prior to it. In addition, the People argued that even if the Second Circuit were to review the merits of Peterson's petition, the state trial judge's participation in questioning the witnesses clearly did not deprive Peterson of a fair trial.

The Second Circuit, however, relying on this Court's opinion in Harris v. Reed, ___ U.S. ___, 109 S. Ct. 1038, 103 L.E.2d 308 (1989), found that the state appellate court had issued a decision that was ambiguous as to whether a state procedural rule was being invoked and that in those circumstances the district court was obliged to determine the merits of the federal constitutional judicial interference claim despite the lack of objection at trial (App. Exh. E, pp. 67-69). Accordingly, the Second Circuit reversed and remanded the action to the District Court for consideration of Peterson's claim.

REASONS FOR GRANTING THE WRIT

In the memorandum decision of the New York Supreme Court, Appellate Division, First Department, three of the five justices stated that they were affirming Peterson's conviction "in view of the overwhelming proof of [Peterson's] guilt"

but added,"[w]e must note, however, the inappropriateness of [the] Criminal Term's unwarranted and excessive intrusion into the conduct of the trial . . . . Had the proof of guilt not been established by such overwhelming evidence, as was here presented, the result of our review might well have been different" (App. Exh. A, p. 4). Because the Appellate Division did not expressly address any federal constitutional claims, the only reasonable interpretation of the opinion is that the court did not reach the legal merits of Peterson's claims.[5] Under established principles of New York law, where a claim of undue interference is preserved and made out, a harmless error exception does not apply and the state

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[5]As noted above, Justice Sidney Asch concurred in the result only (App. Exh. A, p. 4) and Justice Theodore Kupferman, in a separate memorandum opinion, wrote, "I would merely affirm" (App. Exh. A, p. 5).

appellate court must reverse.[6] People v. Mees, 47 N.Y.2d 997, 420 N.Y.S.2d 214, 394 N.E.2d 283 (1979). Since the Appellate Division here criticized the trial judge's conduct but declined to review the merits of Peterson's claim, it necessarily found that the claim was not preserved. That the opinion was not crystal clear should not now open the state conviction to full scrutiny where the state had no reason to make it clearer at the time.

These facts pose three significant issues: (1) whether, in instances where a state appellate court does not indicate that it has passed upon a federal question, there is a presumption under

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[6]In federal cases, various Circuit Courts have found that the claim of judicial interference is subject to a harmless error analysis. United States v. DiPaolo, 804 F.2d 225, 232-233 (2d Cir. 1986); United States v. Wilensky, 757 F.2d 594, 598 (3rd Cir. 1985); United States v. Lott, 751 F.2d 717, 721 (4th Cir.), cert. denied, 470 U.S. 1087, 105 S.Ct. 1852, 85 L.E.2d 150 (1985); see United States v. Mostella, 802 F.2d 358, 361 (9th Cir. 1986) (Kennedy, Cir. J.).

Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969), "that the omission was due to want of proper presentation" and that its decision rests on state law grounds; (2) whether "law and justice," 28 U.S.C. § 2243, mandate that a federal habeas court not review the merits of a constitutional claim raised where no trial objection was made in state court and a federal appeals court would have been without authority, absent "plain error," to review the claim were the case a federal, not state prosecution; and (3) whether the interest in federal-state comity precludes the application of the new rule of construction announced in Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 103 L.E.2d 308 (1989), to cases in which the state appeals were decided prior to it.

1. This case presents the important question whether the rule announced in Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360,

22 L.Ed.2d 576, 579 (1969) -- that where a state court does not pass upon a federal question, there is a presumption "that the omission was due to want of proper presentation in the state courts, unless the aggrieved in this Court can affirmatively show the contrary" -- should apply to habeas corpus proceedings.

This Court recently addressed a related question. In Harris v. Reed, the Court decided to apply to habeas corpus proceedings certain quasi-jurisdictional principles previously used in determining whether certiorari should be granted. ___ U.S. at ___, 109 S. Ct. at 1040, 103 L.E.2d at 313 (1989). More particularly, the Court extended to habeas corpus proceedings the "plain statement" rule. Id. Under that rule, where a state court addresses federal issues as well as independent state law grounds for its decision, absent a plain statement that a state appellate court relied on a state procedural rule in rejecting a defendant's

claim, there is no presumption that the state court applied the state procedural rule. Applying the "plain statement" rule to federal habeas review, the Court held that absent that presumption, there is no forfeiture bar to consideration of the federal claim on federal habeas corpus review under Wainwright v. Sykes, 433 U.S. 72, 81, 87, 97 S.Ct. 2497, 2503, 2506, 53 L.Ed. 594, 604, 608 (1977). Harris v. Reed, ___ U.S. at ___, 109 S.Ct. at 1043, 103 L.Ed.2d at 317.

Accepting the principle that the rules previously associated with certiorari review might provide an appropriate framework for a determination of when there should be habeas corpus review, necessarily raises the question of whether a companion principle to the "plain statement" rule -- the one announced in Street v. New York, 394 U.S. at 582, 89 S.Ct. at 1360, 22 L.Ed.2d at 579 (1969) -- should not likewise apply

to habeas corpus proceedings. In Street, the Court made plain that where a state court does not discuss a federal question, there is a presumption that there was a lack of proper presentation of the federal claim in the state court by the litigant "unless the aggrieved in this Court can affirmatively show the contrary." Id. The presumption announced in Street continues to thrive and has not been disturbed by the "plain statement" rule. See e.g., Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 550, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474, 487 (1987).

Whether the Street rule should follow the "plain statement" rule into habeas corpus jurisprudence is an important issue. The Second Circuit has concluded in this case that unaddressed federal claims must always be decided on their merits. There is simply no reasoned basis for that conclusion. The far more

reasonable approach is the Street rule, and that rule should be extended to habeas corpus litigation. Failure to apply it leaves habeas corpus litigation in the anomalous situation that the Second Circuit has placed it. It requires federal courts to consider claims on collateral review when the most reasonable view is that a state procedural bar prevented those claims from being reviewed in state court.[7]

2. Independent of whether the Street principle should apply is whether "law[*] and justice," 28 U.S.C. § 2243, inevitably mandate

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[7]When one recognizes that New York's rules concerning judicial intervention are stricter than the federal standard, it becomes plain that the state's silence on the federal issue of judicial interference was due to the procedural bar. Under New York law, a preserved, meritorious claim of improper judicial interference mandates reversal regardless of the weight of the evidence. People v. Mees, 47 N.Y.2d 997, 998, 420 N.Y.S.2d 214, 215, 394 N.E.2d 283, 284 (1979). Since the intermediate appellate court referred to the weight of the evidence, it necessarily was considering whether to consider an unpreserved claim under its special interest of justice power.

that a federal habeas court grant full review on the merits of a constitutional claim where no trial objections were made in state court, simply because the state appellate courts arguably did not invoke a procedural rule. In federal criminal proceedings, the absence of a trial objection forecloses federal appellate review absent "plain error." New York, however, does not require a finding of "plain error." Rather, an intermediate appellate court has special authority to review unpreserved claims in the "interest of justice." New York Criminal Procedure Law §470.15(3)(c). Here, the Appellate Division apparently declined to exercise that power, but spoke ambiguously on the point. As a result, the Second Circuit has decided that the district court must now determine whether judicial conduct at the state trial rose to a level of "interference" barred by the federal constitution.

That result is anomalous in the extreme. Had this been a federal trial, the absence of trial objection would have foreclosed federal appellate review absent "plain error." But since this is a state case a more permissive rule will be applied, and conceivably state defendants will obtain relief where federal defendants in an identical position could not. The federal-state tension created by the Second Circuit mandate of full merits review of unobjected-to trial errors is very significant.

Notably, more is involved here than the procedural question of when procedural defaults will or will not be enforced. Title 28 of the United States Code section 2243 requires that a habeas corpus petition be disposed of as "law and justice" require, and petitioners' position is that "law and justice" cannot entitle state prisoners to plenary federal review of their claims in situations where federal defendants

could not obtain such review. Although more than fifty cases in this Court have mentioned the "law and justice" phrase, the efforts to interpret it have been tentative and inconsistent.[8] This

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[8] See, e.g., Hilton v. Braunskill, 481 U.S. 770, 775, 107 S.Ct. 2113, 2118, 95 L.E.2d 724, 732 (1987)(enables federal court to delay release of successful habeas corpus petitioner); Kuhlmann v. Wilson, 477 U.S. 436, 449 n. 11, 106 S.Ct. 2616, 2625 n. 11, 91 L.Ed.2d 364, 378 n.11 (1986) (plurality) (implicates sensitivity to competing interests); Smith v. Murray, 477 U.S. 527, 539-555, 106 S.Ct. 2661, 2669-2677, 91 L.Ed.2d 434, 448-455 (1986) (Stevens, J., dissenting) (in procedural default context requires consideration of type of claim); Murray v. Carrier, 477 U.S. 478, 500-501, 106 S.Ct. 2639, 2651-2652, 91 L.Ed.2d 397, 416-417(1986) (Stevens, J., concurring)(same); Stone v. Powell, 428 U.S. 465, 478 n.11, 96 S.Ct. 3037, 3044 n.11, 49 L.Ed.2d 1067, 1078 n.11 (1976)(represents a broad power, but equitable considerations may limit its exercise); Peyton v. Rowe, 391 U.S. 54, 66-67, 88 S.Ct. 1549, 1556, 20 L.Ed.2d 426, 434 (1968) (permits "appropriate relief" other than immediate release); Fay v. Noia, 372 U.S. 391, 430-431, 83 S.Ct. 822, 844, 9 L.Ed.2d 837, 864 (1963) (permits federal court only to order release); Salinger v. Loisel, 265 U.S.224, 231, 44 S.Ct. 519, 521, 68 L.Ed. 989, 996 (1924) (lays down no specific rule); Storti v. Massachusetts, 183 U.S. 138, 143, 22 S.Ct. 72, 74, 46 L.Ed. 120, 124 (1901) (calls for "substantial justice" to result); In Re Bonner, 151 U.S. 242, 261, 14 S.Ct. 323, 327, 38 L.Ed. 149, 153 (1894)

(continued...)

Court's own varied view justifies review in this case.

Whether "law and justice," 28 U.S.C. § 2243, do or do not require consideration of constitutional claims of error at state trials under circumstances foreclosing review of parallel situations arising at federal trials is an important issue. Indeed, the "equitable nature" of the writ of habeas corpus demands that "in some circumstances consideration of comity . . . require[s] a federal court to forego the exercise of its habeas corpus power." Stone v. Powell, 428 U.S. 465, 478 n. 11, 96 S.Ct. 3037, 3044 n. 11, 49 L.Ed.2d 1067, 1078 n. 11 (1976).

It is difficult to believe that, by Harris v. Reed, this Court intended to permit the wholesale litigation of federal arguments and the overturning of state convictions where no

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[8](...continued)
(invests court with "largest" power to control form of judgment).

constitutional objection was made at the trial level. Yet, that is what the Second Circuit has mandated. It calls for consideration of the merits of a constitutional issue never raised at trial level. Importantly, the court's decision places federal courts in a position in which they are now required to adjudicate, on collateral federal review, claims of state trial errors under circumstances, where, if the same events had occurred in a federal trial, the claims of error would be beyond review on federal appeal absent "plain error." Thus, the question of whether Harris v. Reed requires such an approach mandates the consideration of the Court.

3. Finally, an important issue of retroactivity principles is raised by this case. Prior to Harris v. Reed, the Second Circuit established a rule similar to the Street rule. Unless the state appellate court indicated in some fashion that it had considered the merits of a

federal constitutional claim, the Second Circuit had presumed that the state court had not considered them, so long as a procedural forfeiture argument had been made by the prosecution on state appeal. Rodriguez v. Scully, 788 F.2d 62, 63 (2d Cir. 1986)(citations omitted); Martinez v. Harris, 675 F.2d 51 (2d Cir.), cert. denied, 459 U.S. 849, 103 S.Ct. 109, 74 L.Ed.2d 97 (1982); Gruttola v. Hammock, 639 F.2d 922, 928-929 (2d Cir. 1981). The result was that the state appellate courts were not obliged to issue written opinions invoking state procedural rules in order to ensure that state court judgments would not be overturned in federal collateral proceedings despite defendants' procedural defaults. If Harris v. Reed mandated adoption of a "new rule," the question remains whether or not that new rule should be applied to cases in which the state appeals were decided prior to Harris v. Reed.

Here, not only was the state appeal concluded, but in addition, the petition was filed, and a judgment was rendered by the district court, well before Harris v. Reed was decided. Since the Second Circuit rule of construction existed at the time of Peterson's conviction and was well established, the state had every reason to rely on its applicability. Thus, the state appellate judges had no reason to think it was important for them to specify that they had relied on state procedural grounds in rejecting Peterson's claims. Yet, the Second Circuit found that Harris' new rule should be applied retroactively, and unexpectedly attached determinative significance to the lack of clarity in the state's opinion in the case. Whether it is appropriate to so defeat the reasonable expectations of the state judiciary, and possibly release state convicts whose convictions in fact were affirmed on state procedural grounds, is a

significant question that should be considered by this Court.

* * * * *

Plainly, this case presents important issues concerning habeas corpus jurisprudence and the finality of state court judgments. By seeking certiorari, we seek vindication of the view that federal habeas courts should not adjudicate federal claims where no federal objections were presented at trial and where the state appellate court had no reason to consider the federal claim. Any other view upsets the established norms of federal-state comity. In addition, we seek clarification of the Harris v. Reed decision. We ask the Court to determine whether Harris' new rule of construction should be applied retroactively to cases decided prior to it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NO. 89-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

CHARLES SCULLY, Superintendent of
Greenhaven Correctional Facility,
and STATE OF NEW YORK,

Petitioners,

- against -

FRANK C. PETERSON (80-A-1720),

Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

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EXHIBIT A

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 2, 1986

Present—Hon. Theodore R. Kupferman
Justice Presiding
Sidney H. Asch
Arnold L. Fein
E. Leo Milonas
Ernest H. Rosenberger Justices

The People of the State of New York,

Respondent,

-against-

Order of Affirmance on Appeal from Judgment 24759

FRANK PETERSON,

Defendant Appellant.

An appeal having been taken to this Court by the defendant-appellant

from the judgment of the Supreme Court. New York County (Burton Roberts, J.),

rendered on June 9, 1980, convicting defendant of rape in the first degree, sodomy in the first degree, and robbery in the first degree,

and said appeal having been argued by Jeffrey Stein

of counsel for the appellant , and by Carol Gette,

of counsel for the respondent ; and due deliberation having been had thereon, and upon the memorandum decision of this Court herein,

It is unanimously order that the judgment so appealed from be and the same hereby is affirmed. [Kupferman, J.P. concurs in a separate memorandum, and Asch, J., concurs in the result only.

ENTER:

HAROLD J. REYNOLDS

Clerk.

Judgment, Supreme Court, New York County (Burton B. Roberts, J.), rendered June 9, 1980, which convicted defendant of two counts each of rape in the first degree, sodomy in the first degree, and robbery in the first degree, affirmed.

We affirm in view of the overwhelming proof of the defendant's guilt. He committed rape, robbery and sodomy of two women on different days and at different places. The testimony graphically demonstrated the wantonness of the crimes. The 12 1/2 to 25 year sentences were appropriate.

We must note, however, the inappropriateness of Criminal Term's unwarranted and excessive intrusion into the conduct of the trial. There is no need to set forth examples or details. As the Court of Appeals stated in People v. Yut Wai Tom, (53 N.Y.2d 44, 57): "A Trial Judge's examination of witnesses carries with it so many risks of unfairness that it should be a rare instance when

the court rather than counsel examines a witness. For example, where the court elicits crucial incriminating testimony on direct examination, the witness may be less likely to change his testimony on cross-examination. There is an increased risk that the Trial Judge will inadvertently convey to the jury his disbelief of a witness, not only by his reaction to answers, but by his phrasing of questions and tone of voice. Apart from these risks there is a substantial danger that the court's participation in the trial will result in an unfair tactical advantage to a party."

Had the proof of guilt not been established by such overwhelming evidence as was here presented, the result of our review might well be different. Concur - Fein, Milonas and Rosenberger, JJ.

Asch, J., concurs in the result only.

Kupferman, J. P., concurs in the following memorandum: I would merely affirm.

EXHIBIT B

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. VITO J. TITONE Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

CERTIFICATE DENYING LEAVE

FRANK PETERSON,

Defendant-Appellant

I, VITO J. TITONE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate prusant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

*Description of Order:

Dated at Albany, New York

April 29, 1986

Associate Judge

Order of the Appellate Division, First Department, dated January 2, 1986, affirming a judgment of the Supreme Court, New York County, rendered June 9, 1980.

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANK PETERSON,	
Plaintiff,	REPORT AND RECOMMENDATION
-against-	87 Civ. 1597 (CSH)
CHARLES SCULLY, Superintendent,	
Respondent.	

TO THE HONORABLE CHARLES S. HAIGHT, JR., U.S.D.J.:

Petitioner, Frank Peterson, ("Peterson"), proceeding pro se, seeks a writ of habeas corpus, pursuant to 28 U.S.C. §2254. This proceeding was assigned to The Honorable Charles S. Haight, Jr., D.J., who referred the same to the undersigned for report and recommendation.

CONCLUSION

For the reasons stated herein, I recommend that the writ be denied and the petition dismissed.

BACKGROUND

Peterson seeks a writ of habeas corpus to set aside a June 9, 1980 judgment of the New York Supreme Court, New York County (Roberts, Burton B., J. presiding), convicting him, after a jury trial, of two counts each of Rape in the First Degree, (New York Penal Law ("P.L.") §130.35), Sodomy in the First Degree, (P.L. §130.50), and Robbery in the First Degree (P.L. §160.15).[1] Peterson was sentenced as a second felony offender, (Criminal

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[1]The indictment upon which Peterson was convicted, (Indictment No. 5123/77), was one of three indictments filed against him in November and December 1977 charging him with the sexual attacks and robberies of six women (Indictment Nos. 4625/77, 5123/77, and 5336/77). See Answer, at ¶3; Respondent's Memorandum of Law in Support of Answer, ("Memo of Law"), at 2. Peterson was earlier tried and convicted of rape and robbery under Indictment No. 4625/77. See Memo of Law, at 2-3. While he does not challenge that conviction in this proceeding, Peterson states his intention to bring a separate habeas corpus petition to challenge the consecutive sentence imposed as a result of that conviction. See Petition, at 7.

Procedure Law ("CPL") §400.21), to six indeterminate prison terms of twelve and one-half to twenty-five years. See Petition, at 2; Answer, at ¶¶3-4.

Peterson appealed his convictions to the Appellate Division, First Department. Among other claims, he argued that Justice Roberts's biased intervention during the trial, denied him a fair trial. See Petition, at 3; Peterson's Appellate Brief, ("App. brief"), annexed to the Respondent's Appendix in Support of Answer, ("Resp. App."), at A67-73. In response to this claim, the State argued that the claim had not been preserved for review on appeal, and alternatively, that the claim lacked merit. See Answer, at ¶7; Resp. App. brief annexed to Resp. App., at A125-152.

On January 2, 1986, the Appellate Division unanimously affirmed Peterson's convictions. 116 A.D.2d 461 (1st Dept. 1986). In a memorandum

opinion, three judges stated that they were affirming "in view of the overwhelming proof of [Peterson's] guilt". However, they went on to "note" the "inappropriateness of Criminal Term's unwarranted and excessive intrusion into the conduct of the trial" and stated that "[h]ad the proof of guilt not been established by such overwhelming evidence...the result of our review might well be different". See Resp. App., at A175.

Peterson then sought leave to appeal to the New York Court of Appeals. In his application for leave to appeal, Peterson argued that his excessive intervention claim had been preserved for review on appeal and that the Appellate Division erroneously applied a harmless error analysis. See Resp. App., at A176-180. The State opposed the application, arguing that the Appellate Division had not reached the merits of the intervention claim and had declined to exercise its interests of justice

jurisdiction to review the unpreserved claim. See Resp. App., at A181-182. On April 29, 1986, Associate Judge Vito J. Titone of the Court of Appeals, denied leave to appeal. 67 N.Y.2d 948 (1986). See Resp. App., at A183.

THE PETITION

Peterson raises one ground for relief in his habeas petition. Essentially, he posits that he was denied his constitutional right to a fair trial by virtue of the trial court's unwarranted intrusion during the trial whereby the court, inter alia, "improperly assisted[ ] prosecution witness [ ];...improperly interrupted cross-examination...[and]...improperly attempted to intimidate [Peterson's] alibi witness[ ]...." See Petition, at 5.

Peterson cites six additional pages of the record, which he claims represents "other improprieties" (Id., at 5), but fails to explain

the manner in which they constitute improprieties. Based on other complaints, we believe he ascribes them as judicial improprieties of some type.

FACTS

The facts as adduced at trial may be summarized as follows:

At abut 12:30PM on August 5, 1977, Cheryl Dolinger, ("Dolinger"), then a 28 year old social worker, returned to her apartment located on West 83rd Street in Manhattan after shopping at a nearby supermarket. Tr. 147-148, 152-154.* As she entered the vestibule of her building and prepared to unlock the door to enter the lobby, she noticed Peterson standing next to her. She asked him why he was there, and he answered that he was visiting his cousin. Tr. 154-155. Peterson entered the

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*"Tr." refers to the trial transcript with the number(s) following representing the page(s) thereof.

building behind Dolinger and followed her onto the elevator. Tr. 155-156. Dolinger pressed the button for the fourth floor and Peterson for the third. Tr. 156. When the elevator reached the third floor, Peterson took out a folded knife with a three inch blade and told Dolinger she'd better do what he said so she would not get hurt. Tr. 158-159. When the elevator opened on the fourth floor, Peterson ordered that Dolinger take him to her apartment. Tr. 160. Once in the apartment, Peterson demanded that Dolinger give him her money which she did. He then went through her desk using the blade of his knife to sort through its contents. Tr. 160-163. Peterson walked around the apartment, examining Dolinger's possessions and ordered her to place her stereo inside a large suitcase he had pulled out of the closet. Tr. 163-164. He then ordered Dolinger to undress, (Tr. 164), forced her to perform fellatio, (Tr. 164-

165), and then raped her. Tr. 165-167. Dolinger stared directly at Peterson's face throughout the rape. Tr. 164-166.

When he was finished, Peterson warned Dolinger not to tell anybody about what had happened because he knew her name, address and telephone number. Tr. 167. He then ordered Dolinger to kneel in the far corner of a walk-in closet and told her to count to one hundred before she came out. Tr. 167-168.

When Dolinger had counted to sixty or seventy, she left the closet. Peterson was gone and had jammed the apartment door with a dish towel so that it had not closed completely. Tr. 168-170.

Dolinger telephoned the police and two detectives from the Manhattan Sex Crimes Unit visited her. Dolinger told the detectives what her attacker had done and described him as between

twenty-five and thirty years old, between 5'8" and 5'10", about one hundred sixty-five pounds with black hair and a mustache and wearing Bermuda shorts with a T-shirt. Tr. 552-553. Dolinger viewed twenty-five to thirty photographs, which did not include a photograph of Peterson. Tr. 473-474. Dolinger said that none of the photos was of her attacker. Tr. 478. Approximately, one week later, Dolinger viewed about one thousand photographs and again identified none of them. Tr. 479-481. The detective who showed her the photos did not know if Peterson's photograph was among them. Dolinger was also shown two sketches which had been prepared by a police artist. Tr. 481-483. Dolinger said that the sketches, both of which showed the same black man with a mustache, looked like the man who attacked her. Tr. 545.

On October 28, 1977, Peterson was arrested and placed in a lineup. Dolinger viewed the lineup

and identified Peterson as her attacker. Tr. 183-188. In court, Dolinger testified she was "absolutely sure" that Peterson was the assailant. Tr. 295.

On August 30, 1977 at about 1:00 to 1:30PM, Dianne Culpen, ("Culpen"), left her West 76th Street apartment to go grocery shopping. Tr. 314-317, 321. She returned home sometime between 2:00 and 2:30PM. After entering the unlocked front door, she stood in the vestibule of her building until she found her keys. As she turned to open the locked inner door, she noticed Peterson, whom she did not recognize as anyone with a reason to be in her building, looking at the names on the residents' buzzers. Tr. 322-323. As Culpen entered through the door, she made a deliberate effort to lock it behind her, however, Peterson pushed his way in. He pulled out a folding knife

with a three inch blade and told Culpen to take him to her apartment. Tr. 324-326.

After they entered the apartment, Peterson ordered Culpen to give him all her money, which she did. Tr. 326-329. Peterson took Culpen by the arm and walked her around the living room examining her possessions. He used the blade of his knife to open drawers and shelves and rifle their contents. Tr. 329.

Peterson then ordered Culpen to undress and with the knife at her throat, ordered her to perform fellatio. He then raped her. Tr. 329-333.

When he was finished, he disconnected her stereo and placed the components into two large canvas carry-alls he found in a closet. He also took her more valuable jewelry from a jewelry box in her bedroom and a gold chain she wore. He then ordered her to go into the bedroom closet and start

counting loud enough for him to hear her. Tr. 333-334. When Culpen finally came out, Peterson was gone and had left the front door partially open. Tr. 333-335.

Culpen telephoned the police and detectives from the Manhattan Sex Crimes Squad arrived. Culpen described the sexual assault and robbery to the officers and described her assailant as a black man, about 5'8", weighing one hundred eighty pounds, wearing brown and white checkered pants and a "PUMA" T-shirt. She also told police that the man had no mustache. Tr. 602-603. One of the detectives showed her a police sketch he had brought with him, and Culpen said it resembled her attacker. Tr. 392-395, 610. Culpen was subsequently shown a group of twenty-five to thirty photos including one of Peterson and was unable to identify Peterson as her attacker. When the officer drew her attention to Peterson's

photograph, Culpen said that he could not be her attacker because the man in the photograph had a mustache and longer hair. Tr. 595-597.

When Peterson was arrested on October 28, 1977, Culpen viewed him in a lineup and identified him as her attacker. Tr. 351-352. She also identified him in the courtroom. Tr. 341.

The defense presented numerous witnesses in order to establish that Peterson was not in Manhattan during the time periods in which the attacks occurred. Ornetta Blackmon, ("Blackmon"), testified that Peterson and his girlfriend arrived at another friend's (Cheryl Britton) Jamaica, Queens apartment, at 2:00PM on August 5, 1977. Tr. 761-762. Cheryl Britton subsequently came home at about 4:00PM and they all late dinner together that evening. Tr. 768. Blackmon testified that Peterson was wearing an Hawaiian print shirt and

jeans and that he had side burns and a mustache. Tr. 765-766.

On August 30, 1977, the day Culpen was attacked, Peterson and his mother testified that he left her West 125th Street apartment at 8:00AM wearing dungarees and a white T-shirt with the word, "Hollywood", printed across the front. Tr. 953, 1042, 1045. Peterson went directly to the Port Authority Bus Terminal, where at 9:00AM, he took a bus to New Paltz to see the director of his school's Equal Opportunity Program, Lance Seunerie ("Seunerie"). Tr. 1045-1049. Peterson testified that he and Seunerie met at 11:00AM and then had lunch together. Tr. 1049-1051. Seunerie dropped Peterson off near the New Paltz bus depot at about 12:50PM, (Tr. 923, 1051-1052), but Peterson decided to walk around town and did not take a bus back to the city until after 3:00PM. Tr. 1051-1053, 1121.

Seunerie testified that he did not have an appointment scheduled for Peterson in his office diary, (Tr. 895), for August 30th, nor was there an entry for the lunch. Tr. 899-900. Seunerie, however, testified that he was able to "deduce" that he had met with Peterson on August 30th, based upon his review of his calendar. Tr. 901-906, 919-922. Finally, Seunerie testified that he called Peterson's parole officer on August 30, 1977, the same day that Peterson came to see him. Tr. 931-935. Records of the Manhattan parole office, however, indicated that the first and only call Seunerie made to the parole officer was on the afternoon of September 1, 1977. Tr. 1146, 1148.

PROCEDURAL DEFAULT

The Respondent posits that Peterson is procedurally barred from raising his judicial intervention claim. Respondent points out that Peterson failed to object in the trial court to

Justice Roberts's behavior, as New York law required him to do, and failed as well to move for a mistrial on the basis of the judge's behavior. This procedural default, Respondent claims, prevented Peterson from obtaining a review of this claim in the state appellate courts and likewise bars review of the claim here. See Answer, at ¶9.

It is fundamental constitutional jurisprudence that a federal habeas court will not consider a petitioner's constitutional claim on the merits, which was dismissed on procedural grounds in the state courts, absent a showing of cause for the procedural default and resulting prejudice. Wainwright v. Sykes, 433 U.S. 72 (1977); Rodriguez v. Scully, 788 F.2d 62, 63-64 (2d Cir. 1986).

The issue here is whether Peterson's judicial intervention claim was dismissed on procedural grounds by the Appellate Division. The Appellate

Division's decision, affirming Peterson's conviction, is far from clear, (See Resp. App., at 175); hence, it is for this court to determine whether, "under all the circumstances, it appears likely that the New York courts rejected [Peterson's] claim on procedural grounds or on the merits." Nelson v. Smith, 618 F.Supp. 1186, 1196 (S.D.N.Y. 1985). The grounds stated in the written opinion, controls our inquiry in this regard. Rosenfeld v. Dunham, 820 F.2d 52, 54-55 (2d Cir. 1987), cert denied ___ U.S. ___, 108 S.Ct. 463 (1987). If, upon the basis of our review we find that the State Appellate Court did consider the merits of Peterson's claim despite his procedural default, this court must also consider the merits of Peterson's challenge. Hawkins v. LeFevre, 758 F.2d 866, 874 (2d Cir. 1985).

For the reasons stated herein, we conclude that the judicial intervention claim was dismissed on procedural grounds by the Appellate Division.

I.

Initially, we note that the parties' appellate arguments referable to the intervention claim are in dispute with respect to whether or not Peterson explicitly objected to Justice Roberts's behavior during the course of the trial, hence, preserving the claim for state appellate review. See Peterson's App. brief, annexed to Resp. App., at 73 (wherein Peterson argued that he had preserved the intervention claim for review on appeal by his many objections);[2] Respondent's App.

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[2]We note that the specific instances of judicial improprieties raised by Peterson in his habeas petition, (see Petition, at 5), were among those raised on appeal, and said by appellate counsel, to have elicited appropriate objections. See Peterson's App. brief, annexed to Resp. App., at 73.

brief, annexed to Resp. App., at A126-128 (wherein the State argued that Peterson had failed to explicitly object to Justice Roberts's participation and, hence, failed to preserve this claim for state appellate review).

Based upon our review of the record, we are convinced Peterson failed to explicitly object to the numerous instances of alleged improper judicial conduct, herein challenged by Peterson in his habeas petition.

1. First, Peterson claims that the "[c]ourt improperly assisted prosecution witnesses [ ] (p. 214)." See Petition, at 5. Reference to this incident in the transcript, reveals that on cross-examination, Dolinger, apparently perplexed by defense counsel's repeated questions, asked the court, "I'm supposed to say what I remember?"-an apparent indication that she didn't quite understand what it was that defense counsel wished

her to respond to. Before the court replied, defense counsel stated, "I object to her asking the Court questions." Tr. 214. This "objection" most certainly cannot be construed as an objection to Justice Roberts's behavior. Indeed, defense counsel was objecting to the witness's question.

2. Peterson next claims that the "[c]ourt improperly interrupted cross-examination (p. 202-03, 367-68, 508, 529-530)." See Petition, at 5.

Reference to the transcript at pages 198-203 reveals discussions between counsel and Justice Roberts both during a side-bar and in open court, referable to an official weather report defense counsel wanted to put into evidence. There is no indication in the record that Peterson's counsel took an exception to anything that transpired.

Reference to the transcript at pages 367-368 indicates that the court advised defense counsel that the form of his question was improper.

Counsel entered no objection to the court's interference.

Reference to the transcript at pages 508 and 529-530 indicates that Justice Roberts informed defense counsel that two of his questions were confusing. No objections were taken.

3. Peterson next argues that the "[c]ourt improperly attempted to intimidate [his] alibi witness." See Petition, at 5. No references to the transcript are provided, however, reference to Peterson's Appellate brief, (see Resp. App., at 23-49), and the transcript, reveal numerous instances wherein Justice Roberts engaged in extensive questioning of Peterson's alibi witnesses during their cross examinations. See Tr., at 732-740; 741-742; 744-745; 777-782; 795-802; 803-806; 895-902; 955-957; 963; 970-972. While a number of objections were taken by defense counsel during the court's questioning, none were based upon the

ground that the court was improperly interfering in the proceedings.[3]

4. Finally, Peterson asserts that the court engaged in "[o]ther improprieties" and directs us to the transcript at pages 902, 1068-1069 and 1078-1080. See Petition, at 5.

Reference to the transcript at pages 901-902 indicates questioning by the court, already discussed herein, where Justice Roberts questioned an alibi witness and overruled defense counsel's

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[3]For example, counsel objected to the form of the court's question (Tr. 806); objected on the grounds that the court's question was repetitious, (Tr. 799), and stated a fact not testified to by the witnesses (Id.); objected on the grounds that the court's question was not "proper", (Tr. 970), and because a question allegedly asked for a legal conclusion (Tr. 971); objected on the grounds that the witness had "already testified" to the question (Tr. 742), and because a question concerned a matter that did not have to be probed further (Tr. 963); counsel objected when the court interrupted a witness who was answering a question posed by the court, (Tr. 899), and objected to a question based upon an unstated "principle" (Tr. 902).

vague, unspecified objection "to this principle." Reference to pages 1068-1070 indicates that defense counsel took an exception to the manner in which Justice Roberts was paraphrasing a question posed by the prosecutor. Here, defense counsel advised the court that when the court takes over questioning, he is "put[ ] in a position [that he] object[ed] to what the court[ ] [said]". Tr. 1070. It appears that Peterson's counsel was attempting to register a complaint about Justice Roberts's questioning of witnesses. Reference to pages 1078-1082 indicates that the court engaged in questioning Peterson and that counsel objected twice without stating the grounds and requested a side-bar, which was denied.

Based upon the foregoing, it is apparent that Peterson's counsel did not take explicit exception to the conduct which underlies Peterson's judicial impropriety claim, and that the few times he did

object, the stated grounds were either unclear or concerned such matters as the form of the question. Moreover, at the close of the trial, Peterson failed to move for a mistrial on the grounds of prejudice resulting from Justice Roberts's conduct. Tr. 1187-1191.

Under New York law, an exception not explicitly raised at trial, may not be initially considered on appeal. C.P.L. §470.05(2). See e.g., Clark v. Coombe, 544 F.Supp. 799, 803 (S.D.N.Y. 1982) (Weinfeld, J.) (Pursuant to New York's explicit exception rule, an exception taken to a jury charge which was cast in terms of evidentiary error, did not preserve the claim for appellate review on the ground of constitutional error). The Respondent points out that in People v. Charleston, 56 N.Y.2d 886 (1982), (see Resp. App., at A126-127) the New York Court of Appeals held that in order to preserve a claim for

appellate review, that a trial judge's participation was biased or excessive, the defendant must have objected in the trial Court to "the judge's general course of action or participation as a whole". Id., at 887-888. It is not sufficient if the defense objected to some questions posed by the trial court if the ground for the objections was only that the questions were improper and not that it was the judge who had asked them. Garcia v. Warden, Dannemora Correctional Facility, 795 F.2d 5, 7 (2d Cir. 1986).

While Charleston had not yet been decided at the time of Peterson's trial, the law in New York was well settled at that time, that the purpose of requiring an explicit objection, is to afford the trial court the opportunity to effectively correct any alleged errors at a time when they are correctable. People v. Robinson, 36 N.Y.2d 224,

228 (1975). If counsel fails to accurately apprise the trial court of the basis for an exception, it is difficult, indeed, to fathom how the court would be in a position to effectively correct the alleged error.

It has been observed that "New York follows a stringent approach to the contemporaneous objection rule, a rule which requires that an objection must be 'sufficiently specific to focus attention upon the particular issue sought to be raised on appeal.'" Barber v. Scully, 731 F.2d 1073, 1074 (2d Cir. 1984) (quoting People v. Jones, 81 A.D.2d 22, 36, 41-42 (2d Dept. 1981) (Emphasis supplied).

Indeed, the New York courts have long held that a general or unelaborated objection will not preserve a claim for appellate review, (see e.g., People v. Tarsia, 50 N.Y.2d 1, 9-10 (1980); People v. Cona, 49 N.Y.2d 26, 33 (1979); People v.

Cummins, 209 N.Y. 283, 291-292 (1913)) and that a defendant cannot abandon the ground of an objection made at trial and assign a new one on appeal. See e.g., People v. Lieberman, 47 N.Y.2d 931, 932-933 (1979).

The policy underlying New York's stringent contemporaneous rule was explained by the New York Court of Appeals in People v. Patterson, 39 N.Y.2d 288, 295 (1976), aff'd, 432 U.S. 197 (1977):

> Strict adherence to the requirement that complaint be made in time to permit correction serves a legitimate state purpose. (Cite omitted). A defendant cannot be permitted to sit idly by while error is committed, thereby allowing the error to pass into the record uncured, and yet claim the error on appeal. Were the rule otherwise, the State's fundamental interest in enforcing its criminal law could be frustrated by delay and waste of time and resources invited by a defendant.

In considering whether or not the state appellate court reached the merits of Peterson's

claim, the fact that the Appellate Division did not expressly state that it was relying on procedural grounds in affirming the conviction, is not determinative. Gruttola v. Hammock, 639 F.2d 922, 926, 929 (2d Cir. 1981) (Wherein the court held that the Appellate Division's cryptic discussion affirming the conviction rested upon procedural grounds, where procedural default was raised in the prosecutor's appellate brief). Accordingly, based upon New York's well established and stringently applied contemporaneous objection rule and the important policy considerations underlying it, as well as the fact that the state expressly raised Peterson's procedural default in its appellate brief, we conclude that the Appellate Division's disposition of the intervention claim, rested upon procedural grounds.

II.

We note that a narrow exception to the general New York rule, allows an appellate court to consider a claim first raised on appeal, if the claim involves an alleged violation of a fundamental constitutional right. C.P.L. §470.15(6)(a); People v. Patterson, supra, 39 N.Y.2d at 295. Our continued examination of the Appellate Division's decision, however, convinces us that the court did not exercise this interest of justice jurisdiction with respect to the intervention claim.

First, we note that interest of justice jurisdiction is not routinely invoked by the appellate courts. Martinez v. Harris, 675 F.2d 51, 54 (2d Cir.), cert. denied, 459 U.S. 849, reh'g denied, 459 U.S. 1024 (1982) (citing People v. Robinson, 36 N.Y.2d 224, 228-229 (1975).

Under New York law, it is clear that the mere fact that an error occurred during the trial, is not alone sufficient to trigger this discretionary appellate review. Rather, in determining whether or not to exercise interest of justice jurisdiction, the courts routinely evaluate the strength of the evidence of guilt and decline such review where the proof of a defendant's guilt is overwhelming. See e.g., People v. Semione, 235 N.Y. 44, 46-47 (1923) (Wherein the court declined to exercise its interest of justice jurisdiction where the "defendant's guilt [was] established by evidence so convincing that a different verdict would be unthinkable."); People v. Hunter, 122 A.D.2d 166 (2d Dept. 1986) ("[T]he proof of the defendant's guilt was overwhelming in this case.... Therefore, we perceive no basis for reviewing the alleged [error] as a matter of discretion in the

interest of justice (C.P.L. §470.15(6))."); People v. Swinson, 111 A.D.2d 275, 276 (2d Dept. 1985) ("In light of the strong evidence of guilt, invocation of our interest of justice jurisdiction is not warranted."); People v. Jones, 32 A.D.2d 1069 (2d Dept. 1969), aff'd, 27 N.Y.2d 501 (1970), cert. denied, 400 U.S. 994 (1971) ("[w]e decline to exercise [interest of justice jurisdiction] on the present record where the proof overwhelmingly established the guilt of defendant of the crime for which he was convicted (citations omitted).").

Here, of course, while the Appellate Division did not expressly state that it was declining to exercise its interest of justice jurisdiction, the court, after commenting upon the inappropriateness of the trial judge's excessive intrusions, stated that "[h]ad the proof of guilt not been established by such overwhelming evidence as was here presented, the result of our review

might well be different." See Resp. App., at A175. This clearly suggests that the court found the claimed error egregious enough to warrant interest of justice review, but declined to do so in light of the "overwhelming evidence" of Peterson's guilt.

III.

Another reason convinces us that the Appellate Division did not address the merits of Peterson's intervention claim. According to New York law, an appellant's claim that he was denied his constitutional right to a fair trial due to a trial judge's excessive intrusion, cannot be evaluated on appeal "in the framework of the weightiness of the evidence" because such a claim is "not subject to harmless error analysis". People v. Mees, 47 N.Y.2d 997, 998 (1979) (citing People v. Crimmins, 36 N.Y.2d 230, 238 (1975)). Indeed, as observed by the New York Court of

Appeals in Crimmins, "if in any instance, an appellate court concludes that there has been such error of the trial court...to have operated to deny any individual defendant his fundamental right to a fair trial, the reviewing court must reverse the conviction and grant a new trial, quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction." Id., at 238 (Emphasis supplied).

Since the Appellate Division did place the asserted error "in the framework of the weightiness of the evidence", Mees, supra, 47 N.Y., at 998, the only explanation for having done so would have to be that the appellate court misconstrued the law and applied an incorrect standard in its review. Such an occurrence, in our view, is highly unlikely. Indeed, the record provides no reasonable basis upon which we might conclude that the three eminently experienced

jurists who joined in the decision, would have been unaware of the long-standing and straight forward rule governing appellate review of judicial intervention claims. See Nelson v. Smith, supra, 618 F.Supp., at 1198. (Wherein the court presumed that a state trial judge "would have been well aware" of New York's contemporaneous objection rule).

The far more reasonable interpretation of the Appellate Division's memorandum is that, having found the proof of Peterson's guilt overwhelming, the court chose not to exercise its interests of justice jurisdiction to review the unpreserved claim, even though it found some of the trial court's conduct inappropriate and unwarranted.

In light of the foregoing, "it appears likely that the New York courts rejected [Peterson's] claim on procedural grounds..." and

declined to exercise its interest of justice jurisdiction on the basis of the overwhelming evidence of Peterson's guilt. Nelson v. Smith, supra, 618 F.Supp., at 1196.

Where, as here, a state appellate court has refused to consider the merits of a petitioner's claim on account of his procedural failure, a federal court may consider the claim only if the petitioner can demonstrate cause for and actual prejudice resulting from his procedural noncompliance. See Engle v. Isaac, 456 U.S. 107, 129 (1982); Wainwright v. Sykes, supra, 433 U.S., at 84-91. Peterson has not attempted to show either despite Respondent's thorough discussion of the Wainwright cause and prejudice standard in his opposing memorandum of law, at 32-35.

Our review of the record, however, convinces us that there was no "cause" for Peterson's failure to object in the state trial court's

alleged constitutional errors. In the Appellate Division, Peterson contended that trial counsel's failure to object to all of Justice Roberts's conduct was "excusable" because the judge's intervention was "so extreme". See Resp. App., at 73. In support of this proposition, Peterson cited People v. Charleston, supra, 56 N.Y.2d, at 888, wherein it was observed that it was "conceivable" that extremely intrusive judicial conduct might excuse a defendant's failure to make an appropriate objection.

There is no denying that Justice Roberts's was quite actively involved in Peterson's trial or that he has a rather long history in engaging in such behavior. See Garcia v. Warden, Dannemora Correctional Facility, Supra, 795 F.2d, at 7 (and cases there cited). However, we perceive no basis upon which to conclude either that the trial judge's behavior here was extreme or that because

of it, defense counsel hesitated to disagree with Justice Roberts when he deemed it appropriate to do so.

First, by virtue of the professional and thorough defense presented by Peterson's counsel, it is apparent that he was an experienced litigator. (See also Tr. 1194). When he disagreed with Justice Roberts, he did not hesitate to say so. See e.g., Tr. 367-368; 507-508; 529-530; 795; 805-809; 897-900. While he did not hesitate to object to the court's questions on the grounds that they were misleading, (Tr. 960), irrelevant, (Tr. 963), improper, (Tr. 970), called for a legal conclusion, (Tr. 971), repetitious, (Tr. 799), or improper in form, (Tr. 806), at no time did counsel even suggest that the real basis for his objections was that the judge had embarked on a course which was excessive and biased and which would deny his client a fair trial.

Furthermore, he had ample case law, as aforesaid, addressed to Justice Roberts's conduct to apprise him of the constitutional challenge which could have been made, if circumstances warranted it. See e.g., People v. Mees, supra, 47 N.Y.2d 997. Also see Resp. App., at A68, n.22.

Moreover, we are not persuaded that legitimate cause for Peterson's procedural default has been established merely because People v. Charleston, supra, 56 N.Y.2d 886, was decided after Peterson's trial, resulting in counsel being unaware that he had to explicitly object to the judge's conduct in order to preserve his intervention claim for review. As previously discussed, the law was well established in New York at the time of the trial, that the purpose of an explicit objection is to afford the trial court an opportunity to effectively correct any alleged errors, People v. Robinson, supra, 36 N.Y.2d, at

228; "that an objection must be 'sufficiently specific to focus attention upon the particular issue sought to be raised on appeal,'" Barber v. Scully, supra, 731 F.2d, at 1074 (quoting People v. Jones, supra, 81 A.D.2d, at 36, 41-42); and that a defendant cannot abandon the ground of an objection made at trial and assign a new one on appeal. People v. Lieberman, supra, 47 N.Y.2d, at 932-933. As observed by Judge Conner in Garcia v. Warden, Dannemora Correctional Facility, 613 F.Supp. 302, 308 (S.D.N.Y. 1985), aff'd, 795 F.2d 5 (2d Cir. 1986), "defense counsel simply could not have assumed that by objecting to specific questions or comments, he was apprising the judge of the real nature of the allegedly prejudicial conduct."

In light of the foregoing, we conclude that Peterson cannot establish adequate cause for his

procedural default; accordingly, we may not and do not consider the merits of Peterson's claim.

RECOMMENDATION

For the reasons stated herein, I recommend that the writ be denied and the petition dismissed.

NOTICE

Pursuant to 28 U.S.C. §636(b)(1)(C), as amended, and Rules 72(b), Fed.R.Civ.P. and 7 of this District's Rules for Proceedings Before Magistrates, the parties shall have ten (10) days, plus an additional three (3) days, pursuant to Rule 6(e), Fed.R.Civ.P., of a total of thirteen (13) working days, (see Rule 6(a), Fed.R.Civ.P.), from the date hereof, to file written objections to this Report and Recommendation. Such objections, if any shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of The Honorable Charles S. Haight, Jr.,

Room 2103 at the United States Courthouse at Foley Square, New York, New York, 10007, and to the chambers of the undersigned, at the United States Courthouse, 101 East Post Road, White Plains, New York, 10601.

A party who may feel aggrieved by a recommended decision herein and who fails to file timely objections thereto, waives any right to appellate review of the District Court's order (or judgment) entered relative hereto. See Thomas. v. Arn, 474 U.S. 140 (1985); McCarthy v. Manson, 714 F.2d 234, 237 (2d Cir. 1983). Requests for extensions to file objections shall be made to the Judge and shall not be made with the Magistrate.

DATED: White Plains, New York
December 6, 1988

Respectfully Submitted,

_____

JOEL J. TYLER
UNITED STATES MAGISTRATE

Copies of the foregoing
REPORT AND RECOMMENDATION
were mailed this date to
the following:

Frank C. Peterson, Pro Se
No. 80-A-1720
Green Haven Correctional Facility
Drawer B
Stormville, New York 12582

Carol Gette, Esq.
Assistant District Attorney
Office of the District
Attorney of New York County
One Hogan Place
New York, New York 10013

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANK PETERSON,	
Petitioner,	87 Civ. 1597 (CSH)
-against-	MEMORANDUM OPINION AND ORDER
CHARLES SCULLY, Superintendent of Greenhaven Correctional Facility, et al.,	
Defendants.	

HAIGHT, District Judge:

Petitioner pro se seeks a writ of habeas corpus directing his release from incarceration pursuant to 28 U.S.C. § 2254. I referred his petition, and respondent's opposition thereto, to the Honorable Joel J. Tyler, U.S. Magistrate, for a report and recommendation, to which petitioner has filed timely objections.

Petitioner is presently incarcerated pursuant to a judgment of conviction entered on June 9, 1988 on two counts each of Rape in the First Degree (N.Y. Penal Law § 130.35), Sodomy in the First Degree (N.Y. Penal Law § 130.50) and Robbery in the First Degree (N.Y. Penal Law § 160.15). Peterson argued various claims on appeal, one of which was that the trial judge, Justice Roberts, excessively intervened in the trial. Peterson's conviction was unanimously affirmed by the Appellate Division, First Department on January 2, 1986. People v. Peterson, 116 A.D.2d 461 (1986).

Peterson then sought leave to appeal to the New York Court of Appeals, arguing that his "excessive intervention" claim had been preserved for review and that the appellate division had erroneously applied a harmless error analysis. On April 29, 1986, leave to appeal was denied.

People v. Peterson, 67 N.Y.2d 948 (1986). Petitioner's claims are properly exhausted and he brings this writ challenging Justice Robert's intervention at trial.[1]

Magistrate Tyler is clearly correct in his observation that

---

[1]Specifically, Peterson contends that the "[c]ourt improperly assisted prosecution witness [sic]." Petition at 5 (citing Trial Transcript ("Tr.") at 214). Peterson further argues that the "[c]ourt improperly interrupted cross-examination." Id. (citing Tr. at 202-03, 367-68, 508 and 529-30). He alleges that the "[c]ourt improperly attempted to intimidate [his] alibi witness." Id. (no citations to the trial transcript). Lastly, Peterson claims that the court engaged in "[o]ther improprieties." Id. (citing Tr. at 902, 1068-69 and 1078-80).

In his Report and Recommendation of December 6, 1988, Magistrate Tyler clearly and thoroughly examined each reference to the transcript, evaluating each alleged instance of "intervention" as to whether defense counsel had objected to Justice Roberts' conduct thereby preserving such objections on appeal. Peterson points to no alleged improprieties not already considered by the Magistrate, nor does he posit any additional legal arguments.

> [i]t is fundamental constitutional jurisprudence that a federal habeas court will not consider a petitioner's constitutional claim on the merits, which was dismissed on procedural grounds in the state courts, absent a showing of cause for the procedural default and resulting prejudice. Wainwright v. Sykes, 433 U.S. 72 (1977); Rodriguez v. Scully, 788 F.2d 62, 63-64 (2nd Cir. 1986). Report and Recommendation of Magistrate Tyler at 10 ("Report").

The Magistrate is thus right to frame the initial inquiry in terms of whether the appellate division rejected Peterson's claims on procedural grounds or whether it considered the merits. If the merits of petitioner's claim were considered by the Appellate Division then they must be considered by this Court. However, if Peterson's claim of judicial intervention was not considered by the state appellate court because of a procedural default, then it cannot form the basis of a successful habeas petition. Hawkins v. LeFevre, 758 F.2d 866, 874 (2d Cir. 1985).

The memorandum opinion of the appellate division does not clearly articulate the basis for its decision, three judges stating they were affirming the petitioner's conviction "in view of the overwhelming proof of the defendant's guilt . . . not[ing], however, the inappropriateness of Criminal Term's unwarranted and excessive intrusion into the conduct of the trial." 116 A.D.2d at 462. The fact that the opinion does not expressly state that the court was relying on procedural grounds in affirming Peterson's conviction is not dispositive of the issue. See Gruttola v. Hammock, 639 F.2d 922, 926, 929 (2d Cir. 1981) (holding that the Appellate Division's opinion affirming the conviction rested upon procedural grounds where procedural default was raised in the prosecutor's appellate brief).

Given the ambiguity in the opinion of the appellate division, in combination with the fact

that the state had raised the issue of procedural default in its appellate briefs, the Magistrate properly examined the question of whether Peterson's claim of judicial intervention was preserved for appeal consistent with New York's contemporaneous objection rule. See Barber v. Scully, 731 F.2d 1073, 1074 (2d Cir. 1984) (quoting People v. Jones, 81 A.D.2d 22, 41-42 (2nd Dept. 1981)) ("New York follows a stringent approach to the contemporaneous objection rule, a rule which requires that an objection must be 'sufficiently specific to focus attention upon the particular issue sought to be raised on appeal'"). People v. Charleston makes quite clear that in order to preserve a claim of excessive judicial intervention for appellate review, the defendant must have objected at trial to "the judge's general course of action or participation as a whole." 56 N.Y.2d 886, 887-88 (1982). Defendant

did not so object and his claim was thus not properly preserved for appellate review.[2]

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[2] People v. Charleston was not decided until after Peterson's trial, which he argues excuses any procedural default, but as Magistrate Tyler observed

> the law was well established in New York at the time of the trial, that the purpose of an explicit objection is to afford the trial court an opportunity to effectively correct any alleged errors, People v. Robinson, 36 N.Y.2d 224, 228 (1975); "that an objection must be 'sufficiently specific to focus attention upon the particular issue sought to be raised on appeal,'" Barber v. Scully, supra, 731 F.2d at 1074 (quoting People v. Jones, 81 A.D.2d 22, 36, 41-42); and that a defendant cannot abandon the ground of an objection made at trial and assign a new one on appeal. People v. Lieberman, 47 N.Y.2d 931, 932-33 (1979). Report at 22-23.

I agree. New York's contemporaneous objection rule was well settled at the time of Peterson's trial. The fact that the application of that rule to judicial intervention was not addressed until after his conviction does not excuse Peterson's failure to object to Justice Roberts' intervention at trial.

However, the inquiry does not end with a finding of procedural default. A claim can first be raised on appeal pursuant to New York's interest of justice jurisdiction if it involves an alleged violation of a fundamental constitutional right. N.Y. Crim. Proc. L § 470.15(6)(a); People v. Patterson, 39 N.Y.2d 288 (1976), aff'd, 432 U.S. 197 (1977). It is therefore necessary to determine whether the appellate division did review the merits of Peterson's claim despite his procedural default.

In determining whether the appellate division did review the merits of Peterson's judicial intervention claim, it is important to note that New York appellate courts rarely invoke interest of justice jurisdiction. Martinez v. Harris, 675 F.2d 51, 54 (2d Cir.), cert. denied, 459 U.S. 849, reh'g denied, 459 U.S. 1024 (1982) (citing People v. Robinson, 36 N.Y.2d 224, 228-29

(1975)). Moreover, a claim of judicial intervention cannot properly be reviewed "in the framework of the weightiness of the evidence" because it is "not subject to harmless error analysis." People v. Mees, 47 N.Y.2d 997, 998 (1979) (citing People v. Crimmins, 36 N.Y.2d 230, 238 (1975)). The appellate division clearly evaluated Peterson's claim of excessive judicial intervention in such a framework[3] and to conclude that in so doing it had reached the merits of his claim would be to make a finding that the state court had "misconstrued the law and applied an incorrect standard in its review." Report at 19. I agree with the Magistrate that this is not a

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[3]As discussed in text supra, the opinion of the appellate division affirmed Peterson's conviction in view of the "overwhelming proof of [his] guilt... not[ing], however, the inappropriateness of Criminal Term's unwarranted and excessive intrusion into the conduct of the trial." 116 A.D.2d at 462.

reasonable finding given there is no evidence in the record to support such a conclusion.

> In light of the foregoing, "it appears likely that the New York courts rejected [Peterson's] claim on procedural grounds . . . " and declined to exercise its interest of justice jurisdiction on the basis of the overwhelming evidence of Peterson's guilt. Nelson v. Smith, 618 F. Supp. 1186, 1196 (S.D.N.Y. 1985). Report at 20.

Having concluded that the state appellate court did not review Peterson's claim on account of his procedural default, that claim can now be reviewed only if he can demonstrate cause for and actual prejudice resulting from his procedural noncompliance. Wainwright, 433 U.S. 72. Magistrate Tyler discusses this issue thoroughly in his report and I agree with his analysis.

Peterson had experienced trial counsel representing him, counsel who had appeared before Judge Roberts on other occasions. Defense counsel

voiced numerous objections to the form of Justice Roberts' questions, but never specifically to his intervention. Defense counsel clearly did not hesitate to object when he thought it proper and there is no showing of cause for his failure to object to Justice Roberts' intervention in the trial generally.

CONCLUSION

The Magistrate's Report and Recommendation is adopted in its entirety. The petition for a writ of habeas corpus is denied.

The Clerk of the Court is directed to dismiss the petition.

SO ORDERED.

Dated: New York, New York
January 11, 1989

CHARLES S. HAIGHT, JR.
U. S. D. J.

EXHIBIT E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 440 August Term, 1989

Argued November 17, 1989 Decided February 7, 1990

Docket No. 89-2202

FRANK C. PETERSON (80-A-1720),

Petitioner-Appellant

v.

CHARLES SCULLY, Superintendent of Greenhaven Correctional Facility, et al.,

Respondents-Appellees.

Before: FEINBERG and MESKILL, Circuit Judges, and COFFRIN,[1] District Judge.

Appeal from a judgment entered in the United States District Court for the Southern District of

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[1]Honorable Albert W. Coffrin, United States District Judge for the District of Vermont, sitting by designation.

New York, Haight, J., denying appellant Peterson's petition for a writ of habeas corpus on the basis that Peterson's failure to object at trial to the alleged constitutional error precludes consideration of the merits of his claim on habeas corpus review.

Vacated and remanded for consideration of the merits.

JONATHAN C. SCOTT, St. James, NY, for Appellant.

HOWARD L. PERZAN, Assistant District Attorney, New York County, New York City (Robert M. Morgenthau, District Attorney for New York County, Marc Frazier Scholl, Assistant District Attorney, New York County, New York City, of counsel), for Appellee.

MESKILL, Circuit Judge:

In this appeal petitioner Frank Peterson contends that the district court should have granted his petition for a writ of habeas corpus

because the conduct of the judge who presided over his state trial on charges of rape, sodomy and robbery deprived him of his constitutional right to a fair trial. He appeals from a judgment entered in the United States District Court for the Southern District of New York, Haight, J., denying his petition without reaching the merits of his claim. The district court reasoned that the state appellate court had refused to review the merits of Peterson's claim, and that this refusal precluded consideration of the merits on federal habeas review. See Wainwright v. Sykes, 433 U.S. 72 86-87 (1977).

After the district court's judgment was entered, the United States Supreme Court announced a new rule dictating the manner in which federal courts engaging in habeas corpus review are to construe the opinions of state courts. See Harris v. Reed, 109 S.Ct. 1038 (1989). Because this new

rule requires us to conclude that the state appellate court did reach the merits of Peterson's claim, we vacate the district court's judgment and remand for consideration of the merits.

BACKGROUND

Petitioner Frank Peterson was convicted in 1980 after a jury trial in New York Supreme Court of raping, sodomizing and robbing two victims. Throughout the trial the presiding judge, Justice Burton Roberts, extensively questioned both defense and prosecution witnesses. Peterson appealed his convictions to the Supreme Court, Appellate Division, claiming that Justice Roberts' conduct had deprived him of his constitutional right to a fair trial. The Appellate Division affirmed the convictions in a memorandum opinion. See People v. Peterson, 116 A.D.2d 461, 497 N.Y.S.2d 867 (1st Dep't 1986). Judge Titone of the New York Court of Appeals denied leave to

appeal. See 67 N.Y.2d 948, 494 N.E.2d 127, 502 N.Y.S.2d 1042 (1986).

Peterson then sought a writ of habeas corpus in the Southern District of New York. Judge Haight referred the matter to Magistrate Joel Tyler, who recommended that the petition be denied as procedurally barred. The magistrate found that Peterson's counsel had failed to object at trial to the propriety of Justice Roberts' conduct, as required under New York procedure, and reasoned that the Appellate Division had accordingly refused to reach the merits of Peterson's claim on direct appeal. The magistrate concluded that a federal court therefore could not consider the merits in a habeas corpus proceeding. The district court adopted the magistrate's recommendation and dismissed Peterson's petition without reaching the merits of his claim. Peterson's application for a certificate of

probable cause pursuant to Fed. R. App. P. 22(b) was granted on May 10, 1989.

DISCUSSION

The rules applicable to federal habeas review of a state court conviction are well established. New York has adopted the rule that the right to appellate review of a trial error is waived unless an objection is registered contemporaneously with the error's occurrence. See N.Y. Crim. Proc. L. § 470.05(2) (McKinney Supp. 1990); see, e.g., People v. Robinson, 36 N.Y.2d 224, 228, 326 N.E.2d 784, 786, 367 N.Y.S.2d 208, 211 (1975); People v. Mosley, 67 N.Y.2d 985, 987, 494 N.E.2d 98, 98, 502 N.Y.S.2d 993, 994 (1986). If a state appellate court refuses to review the merits of a criminal defendant's claim of constitutional error because of his failure to comply with such a "contemporaneous objection" rule, a federal court generally may not consider

the merits of the constitutional claim on habeas corpus review. Wainwright, 433 U.S. at 86-87. The question presented in this appeal is whether the Appellate Division reached the merits of Peterson's claim that he was denied a fair trial.

The Appellate Division stated in its short memorandum opinion that Peterson's convictions were affirmed "in view of the overwhelming proof of the defendant's guilt." The court then went on to admonish Justice Roberts for his intrusion into the conduct of the trial, stating that "[h]ad the proof of guilt not been established by such overwhelming evidence as was here presented, the result of our review might well be different." Two of the five judges hearing the appeal concurred only in the result.

At first blush, it appears that the Appellate Division reached the merits of Peterson's claim and affirmed on harmless error

grounds. The state objects to such a construction, however, because New York law clearly provides that a claim that the trial judge's intrusions deprived a criminal defendant of a fair trial is not subject to harmless error analysis. See People v. Mees, 47 N.Y.2d 997, 998, 394 N.E. 2d 283, 284, 420 N.Y.S.2d 214, 215 (1979). Thus, the state argues, to hold that the Appellate Division reached the merits would amount to a declaration that the court was unaware of this rule and committed an error of elementary state law.

Our review of the Appellate Division's decision is made easier by the Supreme Court's recent pronouncement in Harris v. Reed, 109 S.Ct. 1038 (1989), which was decided subsequent to the district court's entry of judgment in this case. In Harris, the Supreme Court stated that "a procedural default does not bar consideration of a

federal claim on either direct or habeas review unless the last state court rendering a judgment in the case '"clearly and expressly"' states that its judgment rests on a state procedural bar." Id. at 1043 (citations omitted). The Appellate Division's opinion makes no mention of a procedural bar. Therefore, we must conclude that the Appellate Division reached the merits. Accordingly, a federal court may review the merits of Peterson's habeas petition.[1]

The state argues that the rule in Harris should not apply in this case because new constitutional rules of procedure generally apply only to cases on direct appeal at the time of the new decision, not to cases on collateral review. See, e.g., Griffith v. Kentucky, 479 U.S. 314, 328 (1987); United States v. Johnson, 457 U.S. 537, 549, 562 (1982). The state concedes that the rule announced in Harris is not constitutionally

mandated, but contends that when a nonconstitutional rule is involved, the principles of finality of judgments and federalism make an even stronger case for not applying the new rule retroactively. We disagree. Our research has disclosed no case addressing the question of retroactivity of the Harris rule. To the contrary, the cases uniformly assume that Harris applies to state court judgments rendered prior to the Supreme Court's decision. See, e.g., Anselmo v. Sumner, 882 F.2d 431, 432-33 (9th Cir. 1989); Fierro v. Lynaugh, 879 F.2d 1276, 1281 (5th Cir. 1989); Lopez v. Scully, 716 F. Supp. 736, 738-39 (E.D.N.Y. 1989). The reason for this assumption, we believe, is that, even though Harris changes the law in this Circuit, see Martinez v. Harris, 675 F.2d 51, 53-55 (2d Cir.) (presumption is that state appellate court affirmed conviction on procedural grounds when prosecution argued

procedural bar and state court affirmed without opinion), cert. denied, 459 U.S. 849 (1982), it does not establish a new rule of constitutionally required procedure. Harris simply instructs the federal courts on how to interpret ambiguity or silence in state court opinions in habeas corpus cases. Accordingly, we must adhere to the Harris rule in reviewing all habeas petitions that come to us after that decision.

CONCLUSION

The opinion of the New York Supreme Court, Appellate Division, does not clearly and expressly state that review of Peterson's appeal was barred on procedural grounds. A federal court therefore may reach the merits of his constitutional claim in a habeas corpus proceeding. Because the district court has not had an opportunity to assess the merits of Peterson's claim, we remand to the district court for consideration of the

merits of the petition. We vacate the judgment of the district court dismissing Peterson's petition and remand for further proceedings.

FOOTNOTE

[1] In their briefs the parties address at length the preliminary question whether the necessity of an objection to Justice Roberts' conduct was established at the time of trial. The answer to this question is unclear, given that the New York Court of Appeals did not expressly apply the contemporaneous objection requirement to a claim of judicial intrusion until the year after Peterson's trial. See People v. Charleston, 56 N.Y.2d 886, 438 N.E.2d 1114, 453 N.Y.S.2d 399 (1982). We need not reach this issue in light of our holding that the Supreme Court's decision in Harris v. Reed dictates that the merits of Peterson's claim be reached. In other words, even

assuming the requirement of an objection was established, and that Peterson failed to object, we must presume that the Appellate Division reached the merits, thereby waiving any procedural default that may have occurred. See Rosenfeld v. Dunham, 820 F.2d 52, 54 (2d Cir.) (federal court must consider merits if state court excuses procedural default), cert. denied, 484 U.S. 968 (1987).

Supreme Court, U.S.
FILED
JUN 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

RECEIVED
JUN 11 1990
OFFICE OF THE CLERK,
SUPREME COURT, U.S.

No. 89-1757

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1989

CHARLES SCULLY, Superintendent of
Greenhaven Correctional Facility,
and STATE OF NEW YORK,

Petitioners

vs.

FRANK C. PETERSON (80-A-1720),

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

MEMORANDUM IN OPPOSITION

JONATHAN C. SCOTT, *
Attorney for respondent
FRANK C. PETERSON,
P.O. Box 2260,
St. James, New York 11780
(516) 584-7777

*CJA Appointed Counsel

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CONCLUSION 6

No. 89-1757

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1989

CHARLES SCULLY, Superintendent of Greenhaven Correctional Facility, and STATE OF NEW YORK,

Petitioners

vs.

FRANK C. PETERSON (80-A-1720),

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MEMORANDUM IN OPPOSITION

Petitioners CHARLES SCULLY, the Superintendent of Greenhaven Correctional Facility, and the STATE OF NEW YORK seek a Writ of Certiorari to review an order of the United States Court of Appeals for the Second Circuit (Second Circuit), rendered February 7, 1990 (App. Exhibit E, pp. 61-73) [1] (Second Circuit). The Court of Appeals

[1]. Page references are to Petitioner's Appendix.

vacated a judgment of the United States District Court, Southern District of New York, dismissing FRANK PETERSON's Petition for a Writ of Habeas Corpus. The District Court refused to address the merits of PETERSON's Constitutional claim that excessive judicial intervention by the Presiding Justice deprived him of his right to a Constitutionally fair trial.

The Second Circuit's reversal of the District Court's judgment was predicated upon the ground that any purported failure of PETERSON's trial counsel to comply with contemporaneous objection rules under New York State law presented no bar to habeas corpus review because the intermediate State appellate Court addressed the merits of the claim. Further, the Second Circuit opined that the State Court judgment was not immune to review by the Federal habeas corpus Court because no plain statement appeared in the decision of the Supreme Court of the State of New York, Appellate Division, First Department establishing reliance upon an adequate and independent State procedural ground in accordance with this Court's decision in *Harris v. Reed*, _____ U.S. _____, 109 S.Ct. 1038 (1989).

SCULLY and the STATE OF NEW YORK take issue with the Second Circuit's application of the rule of construction announced in *Harris* to its review of a final state Court judgment rendered prior to that decision.

As this case presents no issue of exceptional importance and is consistent with decisions by this Court and by Circuit and District Courts confronted with the issue of retroactive application of the *Harris*

rule, PETERSON respectfully submits that the Petition for a Writ of Certiorari should be denied.

STATEMENT OF FACTS

FRANK PETERSON was convicted after a jury trial before the Supreme Court of the State of New York of rape, robbery and sodomy arising from two incidents. He was sentenced to a term of incarceration of from twelve and one-half to twenty-five years and remains in the custody of Charles Scully, the Superintendent of the Greenhaven Correctional Facility.

PETERSON's conviction was based upon the testimony of the two complainants. He presented an alibi defense, which was undermined by the trial Judge's extensive questioning. On his appeal to the intermediate State appellate Court, the majority noted in its opinion the inappropriate nature of the Judge's conduct [2] (A. 4) but affirmed the appeal upon its opinion that the error was harmless. The New York State Court of Appeals denied leave to appeal without opinion.

The District Court dismissed the petition for a Writ of Habeas Corpus upon its conclusion that the

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[2]. The Judge that presided over PETERSON's state trial was formerly a prosecutor and the subject of numerous appellate decisions by the Appellate Division of the New York Supreme Court and of the New York State Court of Appeals, condemning his intrusive conduct during criminal trials. See *People v. Mess*, 47 N.Y.2d 996 (1979); *People v. Tartaglia*, 35 N.Y.2d 918 (1974); *People v. Ellis*, 62 A.D.2d 469 (1st Dept. 1978); *People v. Yut Wai Tom*, 53 N.Y.2d 44 (1981); *People v. Charleston*, 56 N.Y.2d 88 (1987).

procedural default rule barred review. The Second Circuit reversed the judgment of the District Court and remanded to provide the District Court with the opportunity to address the merits of the Constitutional claim.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED ON THE GROUNDS THAT IT FAILS TO PRESENT AN ISSUE OF LAW WARRANTING THIS COURT'S REVIEW. THE SECOND CIRCUIT'S APPLICATION OF THE RULE ANNOUNCED IN HARRIS V. REED TO STATE COURT JUDGMENTS ANNOUNCED PRIOR TO THIS COURT'S DECISION IS CONSISTENT WITH PRECEDENTS OF THIS COURT AND OF OTHER FEDERAL COURTS ADDRESSING THE ISSUE.

FRANK PETERSON respectfully submits that the petition for a Writ of Certiorari should be denied. The Second Circuit's application of the rule announced in *Harris v. Reed* is in conformity with settled jurisprudential principles concerning the retroactive application of rules of construction and it is respectfully submitted no issue of law is presented which would warrant this Court's exercise of its discretionary power to review a judgment by Certiorari.

The essence of SCULLY's claim is that the Second Circuit should not have applied the "plain statement" rule announced in *Harris v. Reed* to its review of a final State Court judgment rendered prior to the time that this Court announced its decision in

Harris. It is submitted that such a claim is contrary to reported Federal habeas corpus decisions, including a memorandum opinion of this Court.

In *Griffith v. Kentucky*, 479 U.S. 314, this Court found that new rules of conduct for criminal prosecutions apply retroactively to all cases, state or federal pending on direct appeal, regardless of whether the new rule overrules past precedent.

In *Yates v. Aiken*, 484 U.S. 211 (1988), this Court held that where a decision is rendered after the time that the state Court judgment becomes final, it is appropriate to apply a rule representing an application of a governing principle announced in a prior decision.

It is submitted that the opinion in *Harris v. Reed* does not effect a substantive change in the law but that it merely instructs the Federal Courts on how to apply the procedural default rule established by this Court in *Wainwright v. Sykes*, 433 U.S. 72 (1977). Indeed, this is the position taken by the United States Court of Appeals in this case (A. 71). In addition, Courts have relied upon Harris v. Reed as guiding the application of the procedural default rule to state Court judgments rendered prior to the Supreme Court's decision. Cf. *Anselmo v. Sumner*, 882 F.2d 431, 432-433 (9th Cir. 1989); *Fierro v. Lynaugh*, 879 F.2d 1276, 1281 (5th Cir. 1989); *Lopez v. Scully*, 716 F. Supp 736, 738-739; *Perez v. Everett Jones*, ____ U.S. _____, 109 S.Ct. 1928 (1989).

In *Perez*, this Court granted certiorari, reversed and remanded a judgment of the United States Court of Appeals for the Second Circuit for

further consideration in light of *Harris v. Reed*. It is submitted that such a ruling by this Court establishes that application of the rule announced in *Harris* to then final state Court judgments is appropriate and supported the reversal of the Second Circuit's order.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied, along with such other and further relief granted to PETERSON as this Court may deem just and proper.

Dated: St. James, New York
June 7, 1990

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Respondent's counsel Jonathan C. Scott hereby certifies that on the 8th day of June, 1990, he served the within MEMORANDUM IN OPPOSITION upon the District Attorney of New York County, Attorney for petitioners, One Hogan Place, New York, N.Y. 10013 by United States Mail.

June 8, 1990

JONATHAN C. SCOTT